

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

KATHERN M. BROWN

Claimant

VS.

GENERAL MOTORS CORPORATION

Self-Insured Respondent

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Docket No. 1,034,317

ORDER

Claimant appeals the February 26, 2009, Preliminary Decision¹ of Administrative Law Judge Marcia L. Yates Roberts (ALJ). Claimant was denied penalties in this matter after the ALJ found that the Order Extending Terminal Dates entered on December 3, 2008, which also ordered respondent to pay the temporary total disability compensation (TTD), was not an order for penalties. It was, instead, an order for the payment of compensation at the maximum weekly rate.

Claimant appeared by her attorney, Michael R. Wallace of Shawnee Mission, Kansas. Respondent appeared by its attorney, Peter J. Chung of Kansas City, Missouri.

The Appeals Board (Board) adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of Regular Hearing held September 2, 2008; the transcript of the evidentiary deposition of Edward Prostic, M.D., taken September 19, 2008, with attachments; the deposition of Prem Parmar, M.D., taken December 9, 2008, with attachments; the transcript of Motion for Penalties Hearing held February 26, 2009, with attachments; and the documents filed of record in this matter. The Board placed this matter on the Summary Docket calendar for determination without oral argument.

¹ While this matter was designated as a Preliminary Decision, it was not rendered pursuant to K.S.A. 44-534a. It was, instead, a final determination under K.S.A. 44-512a regarding claimant's penalty request.

ISSUES

Claimant raised the following issues in her Application For Review:

1. "Whether or not the Administrative Law Judge abused her discretion by modifying a final Award at a Penalty Hearing which was held pursuant to K.S.A. 44-512(a) [sic].
2. "If the Board allows the Administrative Law Judge to modify her final Award, then whether or not the Administrative Law Judge abused her discretion by allowing an extension of terminal dates pursuant to K.S.A. 44-523(b)(1).
3. "If the Board allows the Administrative Law Judge to modify her final Award, then the Award needs to be recalculated to reflect 14 weeks of temporary total disability benefits as opposed to a dollar credit against her Award."²

FINDINGS OF FACT

After reviewing the record compiled to date, the Board concludes the Preliminary Decision should be affirmed.

Claimant suffered a series of injuries while working for respondent, with the last date of injury being November 17, 2006. The matter was proceeding to final award when respondent requested an extension of its terminal date in order to take the deposition of Prem Parmar, M.D. The ALJ granted respondent's request, but required that weekly TTD compensation at the rate of \$483.00 be paid from September 2, 2008, to December 9, 2009, a period of 14.14 weeks, and totaling \$6,829.62.³ That Order extended respondent's terminal date to December 9, 2008. That Order was not appealed, and respondent paid the amount ordered by the ALJ.

The deposition of Dr. Parmar was taken on December 9, 2008, and the matter submitted for final determination. The ALJ, in the Award of December 30, 2008, granted claimant a 20 percent loss of use of her left upper extremity, and a 25 percent loss of use of claimant's right upper extremity. The calculation of the awards for the upper extremities does not take into consideration the weeks of benefits awarded on December 3, 2008. No appeal was taken from the December 30, 2008 Award and it became final.

² Application for Review at 1.

³ Order Extending Terminal Dates, December 3, 2008.

Claimant delivered to respondent on January 2, 2009, by Certified Mail, a Demand for Compensation. Pursuant to K.S.A. 44-512a, claimant then filed a Motion For Penalties, alleging a failure by respondent to pay compensation pursuant to the December 30, 2008, Award. The matter went to hearing on February 26, 2009, at which time claimant denied that the payment ordered by the ALJ in the December 3, 2008, Order represented an order for temporary total disability compensation (TTD). Claimant requested penalties for respondent's failure to fully pay the Award of December 30, 2008. Claimant argued the payment of \$6,829.62 was intended as a penalty and was separate from the compensation awarded on December 30, 2008.

The ALJ, in the Preliminary Decision of February 26, 2009, denied claimant's request for penalties, finding the Order of December 3, 2008, was an order for compensation pursuant to K.S.A. 2006 Supp. 44-523(b)(1). The ALJ also found that the award entered on December 30, 2008, had been fully paid by respondent, granting respondent credit for the monies paid both under the December 30, 2008, Award and under the December 3, 2008, Order. The ALJ noted that claimant was contending that the payments ordered on December 3, 2008, were actually penalties payable above and beyond the amount due under the final award. But the ALJ held that the Workers Compensation Act does not provide for a penalty for disability compensation to exceed \$100.00 per week.⁴ There was no merit found in claimant's argument that the preliminary order of compensation at a weekly rate of \$483.00 was meant as a penalty. It was, instead, meant as a pre-payment of compensation. Respondent was found to have paid the award in full.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2006 Supp. 44-523(a)(b)(1) states:

(a) The director, administrative law judge or board shall not be bound by technical rules of procedure, but shall give the parties reasonable opportunity to be heard and to present evidence, insure the employee and the employer an expeditious hearing and act reasonably without partiality.

(b) Whenever a party files an application for hearing pursuant to K.S.A. 44-534 and amendments thereto, the matter shall be assigned to an administrative law judge for hearing and the administrative law judge shall set a terminal date to require the claimant to submit all evidence in support of the claimant's claim no later than 30 days after the first full hearing before the administrative law judge and to require the respondent to submit all evidence in support of the respondent's position no later than 30 days thereafter. An extension of the foregoing time limits shall be

⁴ K.S.A. 44-512a(a).

granted if all parties agree. An extension of the foregoing time limits may also be granted:

(1) If the employee is being paid temporary or permanent total disability compensation.

The above statute sets out the criteria whereby an administrative law judge may extend a party's terminal date. Here, respondent's terminal date was extended, but respondent was required to pay TTD during the extension. While claimant originally objected to the extension, the decision to extend respondent's terminal date became final when the final Award was not appealed.

K.S.A. 2008 Supp. 551(i)(1) states:

(i) (1) Administrative law judges shall have power to administer oaths, certify official acts, take depositions, issue subpoenas, compel the attendance of witnesses and the production of books, accounts, papers, documents and records to the same extent as is conferred on the district courts of this state, and may conduct an investigation, inquiry or hearing on all matters before the administrative law judges. All final orders, awards, modifications of awards, or preliminary awards under K.S.A. 44-534a and amendments thereto made by an administrative law judge shall be subject to review by the board upon written request of any interested party within 10 days. Intermediate Saturdays, Sundays and legal holidays shall be excluded in the time computation. Review by the board shall be a prerequisite to judicial review as provided for in K.S.A. 44-556 and amendments thereto. On any such review, the board shall have authority to grant or refuse compensation, or to increase or diminish any award of compensation or to remand any matter to the administrative law judge for further proceedings. The orders of the board under this subsection shall be issued within 30 days from the date arguments were presented by the parties.

Claimant's right to appeal the extension of respondent's terminal date expired 10 days after the effective date of the December 30, 2008, Award. Claimant's attempted appeal of the Order Extending Terminal Dates at this time is untimely.

Claimant argues that the ALJ modified her final Award at a penalty hearing. The ALJ did not modify her award in the February 26, 2009, Preliminary Decision; she simply explained the Award. Claimant was arguing that the money ordered on December 3, 2008, was a penalty. The Order from that date makes no reference to any penalty. It, instead, references "benefits" to be paid at the statutory maximum rate of \$483.00 per week. Because the ALJ did not modify the award in the post-award penalty hearing order, claimant's appeal on this issue is dismissed as being untimely.

Finally, claimant requests that the Board recalculate the Award to allow for the TTD granted in the December 30, 2008, Order. Claimant has only 10 days to appeal a final

award of an administrative law judge to the Board. As noted above, claimant elected to not appeal the December 30, 2008, Award. This renders the Award final. Claimant's belated attempt to modify the December 30, 2008, Award is denied as being untimely.

CONCLUSIONS

Claimant's appeals on issues number 1 and number 3 above are denied as being untimely. Claimant's appeal on issue number 2 is denied as the Order Extending Terminal Dates awarded benefits, and not penalties. Claimant's motion for penalties was properly denied by the ALJ.

DECISION

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Preliminary Decision of Administrative Law Judge Marcia L. Yates Roberts dated February 26, 2009, should be, and is hereby, affirmed with regard to claimant's request for penalties. Claimant's appeals of issues number 1 and number 3 are dismissed as being untimely.

IT IS SO ORDERED.

Dated this ____ day of May, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

CONCURRING OPINION

I believe the issue is not whether the ALJ modified the December 30, 2008, Award, but, instead, whether respondent is entitled to receive a credit for the \$6,829.62 in temporary total disability benefits that were paid in connection with respondent's request to extend its terminal date. The Order to extend respondent's terminal date was not appealed and, therefore, it became final. Likewise, the December 30, 2008, Award became final when it was not appealed. Consequently, K.S.A. 44-525(b) controls, and respondent gets credit for the previous amounts paid. That statute provides, in part:

(b) No award shall be or provide for payment of compensation in a lump sum, except as to such portion of the compensation as shall be found to be due and unpaid at the time of the award, or except at the discretion of the director on settlement agreements, **and credit shall be given to the employer in such award for any amount or amounts paid by the employer to the employee as compensation prior to the date of the award.** (Emphasis added.)

In short, the ALJ's decision should be affirmed.

BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant
Peter J. Chung, Attorney for Respondent
Marcia L. Yates Roberts, Administrative Law Judge